THE CONSTITUTIONALITY OF REPUDIATION.

MR. CHAMBERLAIN.

WHEN judicial decisions affect great public questions or interests, criticism and discussion of them often become the duty of those who are qualified to perform it. If lawyers are presumably best qualified for this duty, it is certainly true that lawyers perform it at the greatest personal risk. If, however, such criticism and discussion be marked by exactness of statement, moderation of comment, fairness of argument, and perfect respect toward the court or judge, severity of judgment cannot justly give offense, and freedom of discussion may be of high service in informing public opinion, and even in the administration of the law.

In March, 1883, the Supreme Court of the United States decided two cases, which are commonly known as the Virginia and Louisiana State Bond Cases. The Virginia case, Antoni *vs.* Greenhow, was this: In 1871, an Act of the Virginia Legislature provided that new bonds of the State should be issued in exchange for two-thirds of the old bonds, bearing interest coupons which were declared by the Act and expressed on the face of the bonds and coupons, to be "receivable at and after maturity for all taxes, debts, dues, and demands due the State." The coupons were received for taxes until 1872, when an Act of the Legislature prohibited their receipt for taxes; but the Court of Appeals of Virginia, in Antoni *vs.* Wright, 22 Grattan, 833, set aside the latter Act as a violation of the contract, holding that "in issuing these bonds the State entered into a valid contract with all persons holding the coupons to receive them in payment of taxes and State dues, and that the Act of 1872, so far as it conflicted with this contract," was void. In 1880, in the case of Hartmann *vs.* Greenhow, 102 U. S., 672, the Supreme Court of the United States declared an Act of the Virginia Legislature, which laid a tax on these coupons and required the tax to be deducted

from the coupons when tendered for taxes, an impairment of this contract and void, holding that bonds issued under the Act of 1871 formed "a contract between the State and the holder of the bonds and the holder of the coupons, from which, without their consent, she could not be released." On the 14th day of January, 1882, the Virginia Legislature, a body under the control of what is known in politics as the Mahone party, passed an Act providing that when coupons were tendered for taxes, such coupons should be taken and held by the tax-collector, whereupon the taxpayer should be at liberty to bring suit to establish the genuineness and legality of the coupons; and if it should be finally decided that the coupons were genuine, then they should be received for taxes, and the money before paid refunded to the taxpayer. Antoni tendered coupons for taxes in March, 1882. The tender was refused, and Antoni applied for a *mandamus* to require its acceptance. The Virginia Court of Appeals being equally divided, the writ was denied, and the case was brought by writ of error to the Supreme Court of the United States.

The Louisiana case, Elliott *vs.* Jumel, was this: In 1874, an Act of the Louisiana Legislature provided for the issue of bonds to be known as "Consolidated bonds of the State," for consolidating and reducing the existing State debt. A levy of a tax of five and a half mills for the interest on these bonds was provided by this Act, which was declared to be "a continuing annual tax until the said consolidated bonds shall be paid or redeemed, principal and interest." Immediately after the passage of this Act, the State adopted an amendment to its Constitution, by which the issue of consolidated bonds under the Act of 1874 was declared to "create a valid contract between the State and every holder of said bonds, which the State shall by no means and in nowise impair." The amendment contained several other provisions intended to give all possible legal security to the bonds.

On January 1, 1881, a new Constitution of Louisiana went into effect, by which it was provided that the interest on the consolidated bonds, which had originally been fixed at seven per cent., should be two per cent. for five years, three per cent. for fifteen years, and four per cent. thereafter. This Constitution further provided that the annual tax, originally fixed at five and a half mills, should be not more than three mills; and that

the holders of consolidated bonds should present them to be indorsed or stamped with the provisions just cited in regard to the reduction of interest; and that all the interest on the consolidated bonds falling due January 1, 1880, should be absolutely remitted.

Elliott, with others, holders of "consolidated" bonds, after demanding payment of their coupons, brought suit in equity in the Circuit Court of the United States, seeking an adjudication that the Act of 1874 is "a valid and subsisting law"; that the constitutional amendment of 1874 and the consolidated bonds "are good, valid, subsisting, and binding contracts," "the obligation of which contracts cannot be lawfully or constitutionally impaired; that the Constitution of 1880 does impair this obligation, and is therefore in violation of the Constitution of the United States."

The same parties, in January, 1880, also filed in the State Court a petition for a writ of *mandamus* against the State Auditor and Treasurer and the State Board of Liquidation of Louisiana, requiring them to apply funds then in their hands, raised for that purpose, to the payment of the interest of the consolidated bonds; to levy the tax provided by the Act of 1874; and to perform all the ministerial acts required of them by the Act under which the bonds in question had been issued.

This latter suit was removed to the Circuit Court of the United States. The Circuit Court denied the relief sought in these suits, and, by a writ of error and appeal, they were brought into the Supreme Court of the United States, where they were considered and decided together.

In each of these cases the Supreme Court decided in favor of the State and of the validity of the State legislation in question. In each case the decision of the Court was rendered by a majority, seven out of nine, of the judges, and the opinion delivered by the Chief-Justice, four of the seven judges joining in a separate concurring opinion, in the Virginia case, and the two remaining judges dissenting in both cases. The judges who compose this majority are Waite, Miller, Bradley, Woods, Matthews, Gray, Blatchford; the judges who filed the separate concurring opinion are Bradley, Woods, Matthews, and Gray; the dissenting judges are Field and Harlan. Each case involved the question of the force and effect of the clause of Section 10 of Article 1 of the Constitution of the United States,—"No State shall pass a law impairing the obligation of contracts."

It is scarcely needful to state the scope and effect of these decisions; indeed, the simple correct statement of the cases discloses their character and bearing, even to the general or unprofessional reader. If ever a contract was made by a State, one was made by the States of Virginia and Louisiana in the issue of these bonds. The Supreme Court itself, every member of it, affirms that there was a contract, valid, express, complete, and solemn. In each case the State did pass a law, which in Virginia forbade the receipt of the coupons for taxes until after the performance of the most onerous conditions, and in Louisiana reduced the interest from seven per cent. to two, three, and four. Unless words have lost their meaning, unless logic and reason have lost their force, this is an impairment of a contract by a law of a State. It is to insult the intelligence of the country, the average capacity of its citizens, to say that only lawyers can understand this.

But it is right that the positions of the Court should be presented with entire fairness. And here it may be freely conceded that the Court had nothing to do with the hardship of the cases, the motives of the States, or the ulterior or secondary results of the decisions. It had only to consider and decide this one question in each case: Does the State legislation impair the obligation of the contract on legal grounds, and no other, in a legal sense, and no other? Its duty was to consider and decide what was the true force and meaning of the terms of the State legislation and of the constitutional clause. In doing this, the Court was bound to consider what had been its own decisions in previous cases involving this question. It was also bound to consider, irrespective of previous decisions, what was the true force of the constitutional provision as a matter of forensic or judicial reason. Having done this, it was the duty of the Court, without fear of consequences and without regard to other results, to decide the cases. The opinion of the Chief-Justice in the Virginia case is an effort to show that the Virginia statute is not an impairment of the contract because, although it changes the remedy, it does not change it in such a way or to such a degree as to work an essential injury or impairment of the contract.

Now, neither the Chief-Justice nor any intelligent man will deny that the contract made the coupons receivable for taxes; while the new law requires that all taxes shall be first paid in money, and then permits the taxpayer who has tendered coupons to begin a litigation which may be prolonged for years, and for

the prolongation of which express provision is made in the Act itself; nor, that if the coupon of a bond is once decided by the court of last resort to be genuine and valid, the tax-collector not only may, but must, force the holder of the same bond to repeat the entire litigation as often as a coupon matures; that is, in the case of a forty-year bond with semi-annual interest, *eighty times*. There is no exaggeration in this statement, astounding as it is. The Virginia Act, I repeat, compels the taxpayer to resort to a suit as often as a single coupon matures and is tendered for taxes. All this appears in the opinion of the Chief-Justice. I have no language to characterize such a conclusion from such premises.

I add another statement here: that all the decisions of the Supreme Court, numbering over seventy, upon the construction and application of the clause of the Constitution here in question, from 5 Wheaton to 96 U. S., not including the case of Sneed *vs.* Tennessee in the latter volume, make the present Virginia Act a perfectly clear case of impairment of contract by a State law. I challenge any man to try conclusions on this statement.

The Louisiana opinion is even more remarkable, because the contract there was sanctioned and hedged about by a constitutional amendment. I do not understand the majority of the Court here to deny the impairment of the contract, but to refuse the relief sought. In reaching this conclusion, the Chief-Justice uses these words: "The relief asked will require the officers against whom the process goes to act contrary to the positive order of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do."

What, then, common sense asks, becomes of the constitutional clause which forbids the "State," by its "law," to "impair the obligation of contracts"? Is not such a "law" a "positive order of the supreme political power of the State"? If it violates the obligation of a contract, is it not the solemn and unquestionable function of the Supreme Court to declare such "law," such "positive order of the supreme political power of the State," void and of no effect? I await an answer to this question which shall vindicate from the charge of the gravest error this utterance of the Chief-Justice.

To the same purport are these further expressions in the opinion: "The (State) officers owe a duty to the State alone."

"They can only act as the State directs them to act, and hold as the State allows them to hold." Then let the Chief-Justice, or any one for him, answer this syllogism: A State law which impairs the obligation of contracts is unconstitutional; an unconstitutional law is of no effect, and is as if it had never been. The Louisiana Act does impair the obligation of contracts, as the Chief-Justice admits, and as the learned counsel for the State freely and openly conceded on the argument. The Act is therefore void, and is legally non-existent. There is, therefore, no law of Louisiana, no "positive order of the supreme political power of the State," for the State officers to "act contrary to."

The separate concurring opinion in the Virginia case, as I have said, was filed by Judges Bradley, Woods, Matthews, and Gray. It was written by Judge Matthews. The opinion is very brief; but its brevity does not prevent it from embodying the largest amount of actual and potential judicial heresy to be found in any opinion of any Court of the United States. Its one merit is its intelligibility and boldness. Less surprise, if any, has probably been felt at finding Judge Matthews's name to this opinion than those of his associates. Surprise of no ordinary kind is felt, and will be felt, that Judge Gray has sanctioned such an opinion. This judge is the successor, in an important sense, of Judge Benjamin R. Curtis and Judge Nathan Clifford. No one familiar with the views of judicial duty of either of those judges, so often signalized in the decisions of this Court in such cases as the present, can fail to feel chagrin that this opinion bears the name of Judge Gray. Comment on the opinion itself is nearly superfluous. It flouts every former decision of the Supreme Court upon this topic, and announces a doctrine compared with which the dogma of State sovereignty and secession becomes sound and respectable. It holds expressly that "for a breach of its contract by a State no remedy is provided by the Constitution of the United States against the State itself"; and that "a suit to compel the officers of a State to do acts which constitute a performance of its contract by the State, is a suit against the State itself." There is an audacious novelty about the latter proposition that fairly stuns the mind. From the case of Osborn *vs.* U. S. Bank, 9 Wheaton, 738, in which the opinion was delivered in 1824 by Chief-Justice Marshall,—than which there has never been a judicial decision marked by more solemn and convincing evidences of authority,—through a

hitherto absolutely unbroken line of decisions, it has been established that "as a State itself cannot, according to the eleventh amendment to the Constitution, be made a party defendant to a suit, suit may be maintained against the officers and agents of the State who were intrusted with the execution of its laws."

In that case Marshall said: "If the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him could his principal be joined in the suit."

Nearly fifty years later, in 1872, the Court in Davis *vs.* Gray, 16 Wall, 203, three of the present justices, Miller, Bradley, and Field, being then members of the court, expressly re-affirmed the decision of the case of Osborn *vs.* Bank, upon the present question.

In 1875, in the case of Board of Liquidation *vs.* McComb, 92 U. S., 531, the Court again,—four of the present justices, Waite, Miller, Field, and Bradley, being then members of the court,—without dissent, reiterated and applied these doctrines, citing specially the cases of Osborn *vs.* Bank and Davis *vs.* Gray.

Now, under these last decisions of the Court, and under the opinion of Judge Matthews,—which is merely a bold and express, as well as more logical, statement of what is fully implied in the Louisiana opinions of the Chief-Justice,— no force remains in the constitutional provision forbidding a State to impair the obligation of its contracts, because it is now held that a State may, if it chooses, after the most palpable and wanton breaches of its contracts, repeal or abolish all remedies for the enforcement of them, and thereby be restored to "the immunity from suit, which belongs to it as a political community"—an immunity which, under these decisions, extends to all the officers and agents of the State.

I do not think the revolutionary character of these decisions can be overstated. The history of the public debt question in Virginia and Louisiana, and the special provisions made by those States in regard to the present bonds, show a clear purpose and expectation on the part of the States themselves

to place them beyond further legislative control, and to make them proper subjects for judicial cognizance and enforcement, if occasion should arise. In this faith these many millions of bonds were accepted by their holders at home and abroad. It may be safely said that if, when these contracts were made, the question had been submitted to any lawyer of standing, whether in view of all the former decisions of the Supreme Court the obligation of these contracts could be protected and enforced in that Court, the answer would have been that the precedents and principles established by the Court left no shadow of doubt that all subsequent legislation impairing the obligation of these contracts would be unhesitatingly swept away, and that their performance would be enforced, so far at least as it rested in the ministerial acts of the State officers.

But the pecuniary interests of individuals, however great, are not to be compared with the public misfortune of decisions of our highest court, which, by disregarding a great constitutional provision, and by overthrowing a long line of great precedents, have removed all legal barriers to the specially odious and disgraceful offense of State repudiation.

Bare justice requires it to be added that the dissenting opinions of Judges Field and Harlan are all that could be desired in point of ability, vigor, learning, and judicial integrity of mind.

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MR. WISE.

SEARCH for paradox is a very common employment of the intellect among writers and thinkers. The discovery, real or fancied, of paradox is a most common occasion for ventilating the views of the discoverer. And so it has come to pass of late that several writers, imagining that the decisions of the Supreme Court of the United States lately rendered in the Virginia and Louisiana debt cases are paradoxical, have labored at great length to show that a tribunal selected from the school of ultra Federal views, has in some sort reëstablished the very States Rights doctrines for the suppression of which the country had expended so much of blood and treasure.

There is no ground for the pretention that these decisions disturb any issue decided by our civil war, or revive any doctrine

of States Rights involved in that struggle. The cases arose and were decided under clauses of the Constitution which have existed from the time that instrument was adopted, or very soon thereafter, about which there never has been a political or judicial controversy of importance, and which have in no way been changed or affected by the constitutional amendments growing out of the war. When, in some distant period, the student of our history shall come to examine into the changes in our written Constitution resulting from the war, he will doubtless be astonished to see how few those changes are. The ignorant and the thoughtless are wont to look upon the triumph of Federal authority in the struggle of arms as having accomplished a complete overthrow of State sovereignty and established the supremacy of Federal power, so as in effect to make the States of the Union merely police municipalities, subordinate to the overpowering central Government; and yet no idea could be more utterly absurd, or more at variance with the governmental theories of the most ultra Federalists. The war was not waged for any such purpose, and accomplished no such results, nor has any trained statesman or lawyer ever so maintained.

It were idle to discuss what was done contrary to all theories of States Rights during the war. Much was done, doubtless; for war is a law unto itself, and men with arms in hand will no more observe written charts than they will go into battle with a musket in one hand and a Constitution in the other. But when the war had ended, when the administration of the affairs of government had been remitted to the control of civil authority, Federal and State, it at once became a vital question as to how far the great struggle had enlarged or altered the chart of Federal powers, how far it had curtailed or affected the supremacy of State authority, and in what respect, by changes in either, the rights and remedies of the citizen were altered.

The war itself undoubtedly effected many great changes which are not to be found in the Federal Constitution. Some of these are not even expressed in the new State Constitutions adopted under the reconstruction proceedings. For example, slavery was abolished without either Federal or State assent in Constitutions. Again, the doctrine that paramount allegiance was due to the Federal Government, that issue on which the North and South struggled so long and so fiercely, was not

established by any new clause inserted in the Federal Constitution, but has now become admitted on all hands by the force of the Federal power in war, in the first instance, and by its introduction into the Constitution of every State that resisted it. So we have seen grow up, as a consequence of Federal triumph in arms, theories of construction of Federal power, now unquestioned, which, prior to that struggle, were hotly and bitterly fought; such, for example, as Federal power over our banking system, Federal power over internal improvements, and many kindred questions. In the days of Andrew Jackson and John Tyler, the exercise of such powers was deemed inadmissible under the Constitution. At present, nobody questions the power of the Government or gainsays its right in the premises; and yet the written Constitution of the United States is the same now as then upon all the subjects referred to, unaffected in any way by the amendments adopted since the war.

Between the year 1794 and the year 1865 but one amendment to the Federal Constitution was adopted, and that amendment—the twelfth—only related to the method of electing the President, and need not be considered. In 1865 the thirteenth amendment was adopted, quickly followed by the fourteenth and fifteenth. When peace had been restored, when the smoke of battle had floated off, when civil government again fairly asserted its sway, it became at once important, in the light of the war, of the amendments above named, of the complete subjugation of the States and changes in their Constitutions, to know what were the new relations between the Federal and State Governments. It was difficult for the ignorant soldier of the Union to understand how the triumph and supremacy of that Government whose victories he had helped to win were less than absolute; and the fallen champion of secession, powerless to resist and completely at the mercy of his conqueror, felt that his loss of all he had struggled for could not be less than total, whatever might be his hope. But it was not the ignorant alone who were confused and uncertain as to Federal and State relations; the true solution of the problem vexed the most sagacious statesmen and the most skillful lawyers of America.

Of course, the questions growing out of these changes arose speedily for decision, and the country awaited anxiously the action of the Supreme Court. That great tribunal spoke fully and clearly when it reached the celebrated Slaughter House cases,

in April, 1873, 16 Wallace, p. 36. No cases ever decided involved more to the people of America. The opinion rendered clearly and indisputably settled what change in our written Constitution had been effected by all the war amendments, and defined the new duties, powers, and responsibilities of the Federal Government. The intent, character, and scope of each amendment was explained. It was decided that the sole purpose of the thirteenth amendment was to recognize in the Constitution a fact already accomplished, viz., the abolition of slavery; that the object and scope of the fourteenth amendment was to further protect the emancipated slaves from hostile State legislation; and that the object of the fifteenth amendment was to make them voters.

In the argument of the Slaughter House cases, a construction of these amendments had been urged which, had it been adopted, would have totally altered the relations between Federal and State power theretofore existing. The Supreme Court, pointing to the language of the amendments and referring to the history of their adoption, rejected the construction sought, and disposed of it by saying its effect would be "to fetter and degrade the State Governments by subjecting them to the control of Congress in the exercise of powers, heretofore universally conceded to them, of the most ordinary and fundamental legislation," and "in fact it radically changes the whole theory of the relations of the States and Federal Government to each other, and of both these Governments to the people." After the rendition of this opinion, doubt, uncertainty, and confusion disappeared; the Governments, Federal and State, adapted their administration and legislation to the Constitution and its amendments as they were construed and expounded by our highest tribunal, and it was not until lately that the enlarged construction of the thirteenth, fourteenth, and fifteenth amendments, then, in the Slaughter House cases, rejected, was sought to be revived.

So much, then, for the amendments. If the decision in the Slaughter House cases means anything, the amendments have nothing in them which increases Federal jurisdiction against the States on the line of the Louisiana and Virginia cases, and I confess I do not understand the allusions now and then made to them as containing something out of which Federal jurisdiction to sue States can be contrived. Therefore, I dismiss them

as not involved in the questions touching the Louisiana and Virginia debt cases.

In these two cases the effort was made, by proceedings in Federal courts, to compel the States of Louisiana and Virginia to pay their debts in a way different from what they proposed; or, let us make the issue plainer by admitting, for the sake of argument, that the real effort made was to prevent these States from repudiating. In the discussions of these cases, both in and out of court, a great deal has been said of the morality or immorality of the transactions involved. I submit that if, as I expect to show, the Federal courts had nothing to do with the matter for lack of jurisdiction, all the discussion of morality or immorality, repudiation etc., was idle. Another favorite argument of the minority, in court and out of court, has been that a palpable impairment of contract had occurred, and it was a shame that it was not corrected. I submit that palpable outrage cannot confer jurisdiction, and that wrongs are committed every day upon citizens of the United States under the eyes of her judiciary which they cannot redress for lack of jurisdiction,—wrongs more palpable and violent than any deprivation of property, extending sometimes to deprivation of life, and yet, however indignant the judiciary may be, they are powerless to redress them for lack of jurisdiction. And so I say the moral question involved, the hardship involved, the equities involved are all in these cases beyond consideration, for the barrier of jurisdiction intervenes, or should intervene, and is insuperable before they are reached. Let us see.

In 1787 the Federal Constitution was adopted. It contained a clause which was then, and is now, the only ground on which Federal jurisdiction to maintain these suits is or can be invoked, viz: Art. 1, Sec. 10. "No State shall . . . pass any . . . law impairing the obligation of contracts." Standing thus, a State might have been, and actually was, sued. The decision in Chisholm *vs.* Georgia, 2 Dallas, 419, was to the effect that under the Constitution a State could be sued. But "under a prevailing sense of danger at that time from Federal power," 16 Wallace, p. 82, the eleventh amendment was adopted almost immediately, and went into effect in less than seven years after the adoption of the Constitution. That amendment reads: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted

against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." Surely, nothing could be plainer than this language.

"The Judicial Power" is defined by Burrill as the power to hear and determine controversies between litigants, upon proper cases of law and fact presented for adjudication. The language, "Judicial Power," was used to cover all branches of Federal judicial jurisdiction, for it is used in Article III. to embrace the Supreme Court and all inferior tribunals. The amendment expresses the full scope of that coördinate branch of the Federal Government, and then says it shall not be construed to extend to any suit, etc. Does not this language, standing thus alone and unexplained, show that it was the purpose of the States in adopting the amendment not only to turn this branch of Federal power away from such suits, but to wither it and kill it outright whenever it reached the forbidden ground? It does not say that the power exists and must not be exercised. It says it shall not exist. However it may be with the legislative or executive power, the judicial power, in whole or in part, does not extend to any such subject.

Now, observe this also. This amendment was adopted after the adoption of Art. I, Section 10; yet it is absolute and unqualified. The language, "No State shall pass any law impairing the obligation of contracts," is not coupled with any condition, expressed or implied, that the "Judicial Power" shall be invoked to redress any violation of the law. Nor is the eleventh amendment qualified. It does not say "The Judicial Power, etc., shall not extend to any suit, etc., unless in cases where a State has passed a law impairing the obligation of contracts." On the contrary, the inhibition is broad and absolute, destroying all jurisdiction of the judiciary in suits against the State by the parties named, whether for laws impairing contracts or anything else, and it was enacted after and with full knowledge of the Tenth Section of Article I. We not only have this amendment, which in language is plain, and in date subsequent to the contract clause, but we also have the best authority as to the reasons for its adoption. They are homely, but intelligible.

Says Chief-Justice Marshall, in Cohens *vs.* Virginia, 6 Wheaton, 406:

"It is part of our history that at the adoption of the Constitution all the States were greatly indebted, and the apprehension that these debts might be prosecuted in the Federal courts, formed a very serious objection

to that instrument. Suits were instituted, and the Court maintained its jurisdiction. The alarm was general, and to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress and adopted by the State Legislatures."

Thus we know not only when and how, but why this amendment was adopted, and it has seldom happened that the reasons for the adoption of a law have revived after the lapse of a century, in identical form, as in this case; for the States are now as deeply in debt and as much alarmed as when it was adopted.

It seems to me that with this history of the amendment, this language and these reasons for its adoption before him, a Federal judge who attempts, either directly or indirectly, to implead a State, abandons all consideration of the limits of his jurisdiction, utterly disregards the reason and spirit of the law defining the domain of Federal judicial power, and chases butterflies of sentiment entirely outside his sphere. The mere fact that wrong has been done by one and suffered by another is no ground of Federal jurisdiction; and if Federal jurisdiction does not exist, the Federal Court is as powerless to redress a great wrong as a small one. The palpable object, reason, and spirit of the eleventh amendment was to deny to the judicial power of the United States any vitality whatever in the domain discussed. The effort, in spite of its plain language and the well-known reasons for its adoption, to still invade that domain by indirect methods is not only beneath the dignity of the Federal judiciary, but if pursued will inevitably bring it into ridicule when it reaches a point where it can neither advance nor recede.

When the Supreme Court decided the case of the Memphis and Charleston Railroad *vs.* the State of Tennessee, at the October term, 1879, it struck the true key-note of all this controversy. Said Chief-Justice Waite: "The remedy, which is protected by the contract clause of the Constitution, is something more than the privilege of having a claim adjudicated. Mere judicial inquiry into the rights of parties is not enough. There must be the power to enforce the results of such inquiry before there can be said to be a remedy which the Constitution deems part of a contract. Inquiry is one thing; remedy another. Adjudication is of no value as a remedy unless enforcement follows. It is of no practical importance that a right has been established, if the right is no more available afterward than before."

It is strenuously argued that although the jurisdiction cannot be exercised against a State sued as such, it may still be exercised by suing the officers, and many cases are cited. In some of these cases the Federal hawk has certainly swooped very close to the State dove-cote, and dragged its prey from the very door of safety. But that fact does not prove that the decisions were right, and in most of the cases the exercise of jurisdiction was justified under the general power of equity, where title in a specific thing and danger of irreparable damage from its loss is asserted, to pursue it and reclaim it in specie, allowing any other claimant to interplead and assert title to it.* Especially was this doctrine that officers might be sued, although the State could not be sued, asserted in the Louisiana case. It seems to me that this method of acquiring substantial jurisdiction where it is technically and essentially forbidden, is not only an evasion unworthy of the judiciary, but contrary to every rule of practice and precedent of the tribunals themselves.

I might enumerate many rules of practice applying to ordinary litigation, every one of which must be ignored, forgotten, overlooked, in order to maintain this idea of wriggling sideways into jurisdiction where none exists, by suing agents when they are known to be mere representatives of a principal who confessedly cannot be sued. What would be said of a lawyer who, having a client in controversy with a bank or railroad, brought no suit against either bank or railroad, yet sought mandamus against its employés, from president down to teller or brakesman, to compel them to disobey their principals and do what he wished? A chancellor would laugh him out of court. Yet judges and lawyers are to-day found seriously maintaining that this very thing may be done against a State which adds to the ordinary corporate functions the attributes of sovereignty, and is declared exempt from all interference by "the Judicial Power." What means this guarantee to the States of exemption from the judicial power, if it can thus be avoided and evaded?

* Since this article was written, the Supreme Court has decided the case of Cunningham *vs.* The Railroad Co. *et al.*, in which it has so fully indorsed these views that I may be pardoned a little vanity in alluding to it. Here may be found a full citation of the cases which I forbore from referring to, and an admission that "the Federal hawk had swooped too close to the State dove-cote" in the past. I refer the lawyer and student to that decision as the true exposition of Federal law on this subject.

"The State" is not a tangible entity, on which process could be served in any event. Its sovereignty is only manifested through these very public servants who, according to the contention of the opposite side, can be sued. If jurisdiction to sue the State existed, how would she be reached by process? Manifestly, by service upon her officers, who are the visible and tangible exponents of her invisible and intangible sovereignty. If judgment were rendered, how would it be executed? Manifestly, by mandates to these same officers; for the State has no ogres or genii or spirits to work her will. Therefore, if she could be sued, exactly the same thing would occur as may happen when she cannot be sued, according to our opponents, and the eleventh amendment of the Federal Constitution is a "something—nothing," only securing to the State the barren privilege of not being named specifically in the writ. Does any sensible man believe that this was the object of the States in insisting upon this eleventh amendment?

But suppose the Supreme Court had adopted the contention of the appellants in the Louisiana case, for example, and proceeded to order the State officers to do thus and so. To grant the prayer of the bill it was necessary to order the State Auditor and Treasurer to deal with funds in the State treasury, and levy and collect taxes contrary to acts of the Legislature. The State judiciary would not have attempted to exercise such control, for the Constitution of Louisiana forbade the judiciary from invading the Legislative Department; and these questions of State finance were political questions, dependent on legislative discretion, and out of the pale of judicial functions. Yet, although the domestic State judiciary could not interfere, a Federal tribunal would have to exercise discretionary political powers higher than those possessed by the coördinate department of the State, provided the State, who was no party and could not be bound by the proceedings, took no step to look out for her own interests. These State officers thus acting would of course be kept before the Court, to report from time to time their actings and doings in levying taxes, paying bonds, etc. Their bondsmen would of course be relieved from all liability on their regular bonds given as State officers. The Court would be compelled to require new bonds. At last, we should have the spectacle of the affairs of a sovereign State in the hands of receivers of a foreign tribunal, without the State ever having been party to the

cause; and of taxes levied on her people by a Federal court. If there ever was such a spectacle of sovereignty, it has not been recorded; and if such a state of things is possible, the talk about States having any sovereignty is mere sound, signifying nothing. If we pursue this wonderful scheme, it becomes more bewildering than the relationship of children, offspring of father and son who marry daughter and mother; and if we begin to think what the State, who never has been sued and is in no wise bound, may be doing through her Legislature and otherwise, while her officers are being ordered around by the Federal court, we will not only conclude that the effort to exercise these powers is forbidden, but ridiculous, and calculated to put any judge in the mad-house who opens the Pandora-box of such a jurisdiction.

A good deal has been said in dissenting opinions and other papers about exercising this jurisdiction, because the State has consented to be sued. It seems to me such language is loose. How can a Federal court acquire jurisdiction by consent in a case like this? Suppose the State stood begging at the door to be sued, does not the eleventh amendment say, "The judicial power of the United States shall not be construed to extend to any suit," etc.? Then if it shall not be construed to extend to any such case, how can consent give jurisdiction?

That the consent was given to suits begun in a State court and removed to a Federal court does not help the matter, for the inhibition extends not only to suits "commenced" but to those "prosecuted" in the Federal court. This language was used advisedly; it was intended to wither and destroy this branch of Federal jurisdiction entirely. Consent could not give jurisdiction in a case "commenced" or in a case "prosecuted" in a Federal court, for the judicial power there to entertain such cases is no power at all. It has no more power to hear such a cause than it has to impeach the Emperor of Brazil for drunkenness, and if it had power to hear it, there is not sufficient power in all the machinery of Federal judiciary to reach the political agencies which must be moved to pay State debts.

The Supreme Court of the United States when it refused to grant the relief prayed for in the Louisiana case, asserted no new States Rights theory whatever, but merely pointed to a failure of jurisdiction in Federal courts which has been known to exist for nearly a century, and declared, what every student knows, that this exemption on the part of the State from suits

in Federal tribunals is one of the undisputed reserved rights of sovereign States. If it is wrong that such a condition of law should exist, it is a wrong very deliberately committed by the States; for after the right of suit once existed they took it away. Taking it away, as was done by the eleventh amendment, did not make the clause against laws impairing the obligations of contracts a dead letter; it only took away jurisdiction in such cases where the State was a party defendant, and left the jurisdiction to invalidate such laws in suits between proper parties.

I forbear from citing further authorities, but respectfully submit that the careful study of Supreme Court decisions fails to discover the alleged leaning toward States Rights doctrines. This much is true, however,— that a tribunal essentially Federal, more independent of the power of the States than any other body or officer in any of the departments of Government, has from the beginning oftener pointed out the boundary where Federal power ends and State power begins than any other in our Government. But this is because it has oftener studied and expounded the Constitution, which, the more it is studied, discloses more and more, and often surprisingly, that "immense mass" of sovereignty still remaining in the States, alluded to so often by Chief-Justice Marshall.

The Supreme Court of the United States, while it has been always bold and quick and clear to recognize and announce, whenever called upon, essential and inherent powers in the Federal Government to maintain its supremacy, whether that power was derived from the express or implied language of the written Constitution, or from higher law, has nevertheless with steady hand insisted that until the Constitution shall be blotted out, our form of government is duplex, with rights and powers in States which cannot be ignored or construed away, unless the language of the Constitution is as sounding brass and a tinkling cymbal. To have held this truth steadily in view amid all the disturbing surroundings and all the temptations of power to ignore it; to have held an oftentimes unwilling people up to its recognition; to have stood through all these years until the people have been brought back to truth and soberness in their understanding of Federal and State relations,— is a record which must always redound to the honor, power, and glory of that great tribunal, the Supreme Court.

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